of custody based on insanity negatives, at least prima facie, the presence of the element of intent. Therefore it would seem to follow that a crime has not been legally and substantially set forth, and that the court correctly stays the extradition proceedings where the extradition papers themselves show the mental irresponsibility of the person.

The only question before the court was extradition or no extradition. But query: if New York had given evidence of its status as guardian under the *parens patriae* doctrine, and evidence of the ward's escape, and sought return, not upon the ground that Thaw was a criminal but that he was a ward subject to guardianship control, would not New Hampshire in that case have surrendered him up as a matter of comity? The tendency of modern decisions is to recognize, as a matter of comity, the rights of foreign guardians in respect of the persons of their wards;[7] and in many cases the courts have awarded custody of the ward's person to foreign guardians, with right of removal to the state from which guardianship control emanates.[8] The courts have almost uniformly made the welfare of the ward the sole controlling factor in determining whether to recognize a foreign guardianship—thus considering it their duty to give effect to the principle of comity in all cases where the well being of the ward does not interfere.[9]

So it would seem that the proper proceeding on the part of New York should have been something like this: attempt to retake the person of Thaw, there being no liability for false imprisonment for such an act;[10] but if this were unsuccessful, petition the proper court for an adjudication of Thaw's present insanity, and on the basis of this adjudication ask for the recognition of the guardianship status in New York. In such a proceeding, the question before the court would not have been whether the executive acted within his strict legal rights, but whether in the sound discretion of the judicial department alone, guided by considerations of the ward's well-being, the recognition of the foreign guardianship was justified.

J. C. A.

CRIMINAL LAW: OYSTERS AS SUBJECTS OF LARCENCY: RESERVATION OF OYSTER LANDS.—Common-law analogy afforded by growing vegetation, or, perhaps as readily, by stones or pebbles, might easily have induced the courts to regard the lowly oyster as a part of the freehold whereon it lived. However, it is judici-

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[7] Woodworth v. Spring (1862), 4 Allen 321; Hanrahan v. Sears (1903), 72 N. H. 71, 54 Atl. 702.

[8] Taylor v. Jeter (1862), 33 Ga. 195, 81 Am. Dec. 202; Grimes v. Butsch (1895), 142 Ind. 113, 41 N. E. 328; Nugent v. Vetzera (1866), L. R. 2 Eq. 704, 12 Jur. (N. S.) 781, 35 L. J. Ch. 777, 15 L. T R. (N. S.) 33.

[9] Woodworth v. Spring, supra, note 7, at p. 325.

[10] Townsend v. Kendall (1860), 4 Minn. 412, 77 Am. Dec. 534.

ally settled that oysters and similar shell-fish are chattels,[1] a distinction not immaterial when it is considered that at common law larceny cannot be committed of things savouring of the realty, and, at the time they are taken, parcel of the freehold.[2]

As personalty oysters are usually classified with animals *ferae naturae;*[3] in which latter, according to the same law, such a qualified property can be acquired by reclaiming and taming, or confining them within the owner's immediate control, that, if fit for food, they may be subject of larceny.[4] But "oysters have not the power of locomotion", and "if at liberty, they have neither the inclination nor the power to escape". Consequently the creatures do not always come within the reason and operation of the rule applicable to wild animals generally. Thus where they grow on private lands not a common fishery, property in them vests ordinarily in the proprietor of the soil. Indeed, for most, if not all, practical purposes an owner of oysters has the same absolute property therein that he has in inanimate things or domestic animals.

Similar private proprietary rights may be had in oysters which the owner has planted in a common fishery, on public lands or beneath public waters, in a bed where they did not exist naturally, and which is set off by stakes, or otherwise sufficiently indicated to show private possession,[5] and these rights extend to offspring of parent oysters so planted, remaining within the limits designated.[6] The gathering of such oysters may be larceny:[7] but not, if they are planted in what is already a natural oyster bed, or the bed itself is insufficiently defined, under which circumstances they are treated as abandoned to the public.[8] Whether legislative reservation of public oyster grounds, prohibiting taking of oysters therefrom, amounts to reclaiming the oysters so reserved from their wild condition, and a reduction of them to possession, effective to support a prosecution for larceny of oysters, as the property of the state, is a nice question. But the Supreme Court of Washington answered correctly, it is submitted, when it sustained the

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[1] People v. Wanzer (1904), 88 N. Y. Sup. 281, which repudiates dictum to contrary in Mott. v. Underwood (1896), 148 N. Y. 463, 470, 42 N. E. 1048, 1050.

[2] Bl. Com. (Cooley's ed.), bk. iv, ch. 17, pp. 233 et seq.

[3] State v. Taylor (1858), 27 N. J. L. 117, 22 Am. Dec. 347; Sutter v. Van Derveer (1888), 47 Hun. 366.

[4] Bl. Com. (Cooley's ed.) bk. ii, ch. 25,pp. 391 et seq.; Id., bk. iv,ch. 17, p. 235.

[5] Fleet v. Hegeman (1835), 14 Wend. 42; People v. Hazen (1890), 121 N. Y. 313, 24 N. E. 484; also cases in notes 3, 6, 7, and 8.

[6] McCarty v. Holman (1880), 22 Hun. 53.

[7] State v. Taylor, supra, note 3; People v. Wanzer, supra, note 1; People v. Morrison (1909), 194 N. Y. 175, 86 N. E. 1120, 195 N. Y. 116, (1909), 88 N. E. 21.

[8] State v. Taylor, supra, note 3; Decker v. Fisher (1848), 4 Barb. 592; Brinckerhoof v Starkins (1851), 11 Barb. 248; Francisco v. Schmeelk (1913), 141 N. Y. Sup. 402.

demurrer to the information in *State v. Johnson.*[9] After all there is a difference between animals, which are the property of the people of the state, and a book in the state library, belonging also to the people of the state.

T. A. J. D.

DEDICATION: PARKS: CHANGE OF USE.—A property owner fronting on a street opposite a municipal park seeks to enjoin the Board of Park Commissioners, from erecting in the park a garage for automobiles and auto trucks to be used by members of the park board and their employees in caring for the public parks of the city. The Supreme Court of Oregon, in *Wessinger v. Mische,*[1] holds in the complainant's favor.

Such a structure may amount to one or more of the following: (1) a mere purpresture, (2) a violation of abutters' rights, or (3) a public nuisance. To prevent a mere purpresture, only the fee owner, the trustee, or the public, by its authorized representative, the state, may sue.[2] When the purpresture works an injury to an adjoining property owner, an injury peculiar to him as owner of that particular parcel of property, then such property owner may enjoin its erection or maintenance. When the purpresture amounts to a public nuisance, the public, by its authorized representative, the state, may sue for its abatement. But it is not necessary to show a public nuisance before the property owner can maintain his suit.[3] By the dedication, the public as an indeterminate body, represented not by the city, park board, or county, but by the state, has acquired a right to have that land devoted to park uses. In an analogous manner, the abutting property owner gains a similar right, as a sort of easement to his land, and before he should be allowed to prevail, he must show, not only a violation of the public right (a purpresture) but he must also show a special injury to himself, apart from the public. Whether this amounts to a public nuisance or not is immaterial to his suit.

Where the threatened injury is clearly authorized by the legislature a difficult and unsettled question is raised, as to the extent of the powers of that body to alter or terminate the park, as against abutters.[4] But confining the question to cases where the legislature allows the public easement in the park to remain intact, and eliminating cases where a distinction is made between public parks and public squares, such specific cases as the one in question are in general not difficult of solution.

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[9] (July 22, 1914), 141 Pac. 1040.

[1] (Ore., June 30, 1914), 142 Pac. 612.

[2] Trustees M. E. Church v. Hoboken (1868), 19 N. J. Eq. 355, and (1868), 33 N. J. Law 13; People v. Park and Ocean R. R. Co. (1888), 76 Cal. 156, 18 Pac. 141; 8 Harv. Law Rev. 234; 12 Harv. Law Rev. 145.

[3] Fessler v. Town of Union (1903), 67 N. J. Eq. 14, 56 Atl. 272, affirmed in Town of Union v. Fessler, 68 N. J. Eq. 657, 60 Atl. 1134.

[4] 3 Dillon, Mun. Corp., 5th ed., 1759.